

## Part III - Administrative, Procedural, and Miscellaneous

### Section 67 Limitations on Estates or Trusts for Bundled Investment Management and Advisory Costs

Notice 2008-32

This notice provides interim guidance on the treatment under § 67 of the Internal Revenue Code of investment advisory costs and other costs subject to the 2-percent floor under § 67(a) that are bundled as part of one commission or fee paid to the trustee or executor (“Bundled Fiduciary Fee”) and are incurred by a trust other than a grantor trust (nongrantor trust) or an estate.

#### BACKGROUND

On January 16, 2008, the Supreme Court of the United States issued its decision in Michael J. Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner, 552 U.S. \_\_\_, 128 S. Ct. 782 (2008), holding that costs paid to an investment advisor by a nongrantor trust or estate generally are subject to the 2-percent floor for miscellaneous itemized deductions under § 67(a). The IRS and the Treasury Department expect to issue final regulations under § 1.67-4 of the Income Tax Regulations consistent with the Supreme Court’s holding in Knight. The final

regulations also will address the issue raised when a nongrantor trust or estate pays a Bundled Fiduciary Fee for costs incurred in-house by the fiduciary, some of which are subject to the 2-percent floor and some of which are fully deductible without regard to the 2-percent floor. The final regulations, however, will not be issued prior to the due date for filing 2007 income tax returns (determined without regard to extensions), and will apply only prospectively. Accordingly, in light of the Supreme Court's decision in Knight, the IRS and the Treasury Department are providing interim guidance that specifically addresses the treatment of a Bundled Fiduciary Fee.

#### INTERIM GUIDANCE

Taxpayers will not be required to determine the portion of a Bundled Fiduciary Fee that is subject to the 2-percent floor under § 67 for any taxable year beginning before January 1, 2008. Instead, for each such taxable year, taxpayers may deduct the full amount of the Bundled Fiduciary Fee without regard to the 2-percent floor.

Payments by the fiduciary to third parties for expenses subject to the 2-percent floor are readily identifiable and must be treated separately from the otherwise Bundled Fiduciary Fee.

The IRS and the Treasury Department anticipate that final regulations under § 1.67-4 will be published without delay after the extended comment period granted in this Notice. The final regulations may contain one or more safe harbors for the allocation of fees and expenses between those costs that are subject to the 2-percent floor and those that are not. Any safe harbors in the final regulations for determining the allocation of a bundled fiduciary fee between costs subject to the 2-percent floor and

those not subject to the 2-percent floor may be available for taxpayers to use for taxable years beginning on or after January 1, 2008.

#### REQUESTS FOR COMMENTS

Interested parties are invited to submit comments on this notice and § 1.67-4 of the proposed regulations published in the Federal Register of July 27, 2007 (2007-36 I.R.B. 551 [72 FR 41243-01]) by May 27, 2008.

The IRS and the Treasury Department are considering various modifications to § 1.67-4 of the proposed regulations that may include safe harbors for determining the allocation of a Bundled Fiduciary Fee between costs subject to the 2-percent floor and those that are not. The IRS and the Treasury Department request comments on whether safe harbors would be helpful and request suggestions on how the safe harbors may be formulated. Comments are specifically requested on reasonable estimates of the percentage(s) of the total costs of administering a nongrantor trust or estate that is attributable to costs subject to the 2-percent floor including, but not limited to, costs for investment management and advice. Comments are also requested on whether the safe harbors should reflect the nature or value of the assets in the nongrantor trust or estate, and/or the number of beneficiaries of the nongrantor trust or estate.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice XXXX-XX), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice XXXX-XX),

Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W.,  
Washington, DC. Comments may also be submitted electronically via the following e-mail address: [Notice.Comments@irscounsel.treas.gov](mailto:Notice.Comments@irscounsel.treas.gov). Please include Notice XXXX-XX in the subject line of any electronic submissions.

#### EFFECTIVE DATE

This notice is effective February 27, 2008.

#### CONTACT INFORMATION

The principal author of this notice is Jennifer N. Keeney of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Jennifer N. Keeney at (202) 622-3060 (not a toll-free call).